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ABSTRACT

Although much has been done at the federal level to control deceptive advertising practices, many states have no criminal laws designed to regulate advertising, and several states recently repealed such laws. This paper examines states' efforts to balance the advertiser's freedom of speech with the consumer's need for information about products by comparing state legislation with five descriptive elements of the term "deception" and seven provisions about deceptive business practices outlined in the "Model Penal Code" of 1962. Some of the unacceptable practices include mislabeling or adulterating products and making false or misleading statements. The paper reflects the assumption that the line of demarcation between legitimate, desirable business conduct and illegitimate business conduct is continually in flux and is subject to great controversy, which can account for the variety of legal interpretations made by the states. (RL)

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DECEPTIVE BUSINESS PRACTICES:

STATE REGULATIONS

by

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Introduction

The power to regulate advertising and promotional practices for purposes of interstate trade is derived from the Federal Trade Commission Act of 1914.[1] This law directs the Federal Trade Commission to prevent persons subject to the act from using "unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce".[2] The phrase, "unfair or deceptive acts or practices in commerce," was amended in 1938 as a result of the Wheeler-Lea Act.[3]

The regulatory power of the Commission may be exercised whenever it "shall have reason to believe" that someone is engaged in practices forbidden by the act and that a proceeding by the Commission "would be to the interest of the public".[4] This would include either injury to a competitor or injury to consumers themselves.

The FTC has acted against a number of types of false, misleading or deceptive business practices. For example, use of various labels or trade-names which create the impression that the product advertised is something other than it actually is, has frequently been held to constitute an unfair method of competition or deceptive practice.[5]

Furthermore, doing business under a name which has a tendency to create an erroneous impression as to the nature of the business carried on has been held in some cases to constitute a deceptive practice subject to corrective

action by the FTC.[6] And advertising which falsely represents the type of business done or the extent of such business has on occasion been restrained by the FTC.[7]

Misrepresentations as to the going price of articles advertised, and various schemes under which a prospective buyer is induced to believe that he is getting something for nothing, or that he has been specially selected as one to receive a particular article at a greatly reduced price, have been restrained by the FTC as well.[8]

Moreover, the courts have generally upheld FTC action barring use of fictitious testimonials and unauthorized indorsements.[9] And extravagant claims as to the content, makeup, performance, or characteristics of a product have frequently been held sufficiently misleading to merit action by the FTC.[10]

Although state statutes excuse the time-honored custom of "puffing",[11] such advertising methods have been rejected by federal law where the exaggeration was too extreme.[12] And orders of the FTC restraining advertising claims in regard to the curative value of various preparations and devices have been upheld in a wide variety of cases.[13]

Advertising or labeling which creates an erroneous impression as to the origin of the product advertised has occasionally been found by the FTC to be misleading or deceptive, and cease and desist orders in such cases have been upheld by the courts.[14]

While the FTC Act makes no specific mention of disparaging remarks about competing products, upon occasion the agency has ruled that such remarks may constitute an unfair method of competition, and its orders to refrain from

such activities have been upheld. It has generally been held, however, that expressions of opinion, as distinguished from statements of fact, may not be made the basis for a cease and desist order of the FTC.[16]

Nevertheless, advertisements, even though technically true, have been held misleading and subject to restraint if they demonstrate a tendency to mislead the casual reader.[17] Yet, while the body of federal regulation concerning false, misleading and deceptive advertising is far more comprehensive than that embodied in most state statutes, it is also highly restricted in that it must be confined to interstate commerce.

State law, on the other hand, is intended to regulate advertising within the limits of each respective state. Many states have no criminal laws designed to regulate advertising, and several states have repealed such laws recently.[18] Still other states have adopted laws concerning deceptive business practices similar to those proposed by The American Law Institute in its Model Penal Code of 1962.[19] These unacceptable practices include mislabeling or adulterating products; making false or misleading statements in any advertisement addressed to the public, or for the purpose of obtaining property or credit, or for the purpose of promoting the sale of property or securities.[20]

The behavior which will be discussed in this paper "...involves restraints upon the free operation of business without at the same time denying commitment to a free enterprise system".[21] Here an assumption is being made that "(t)he demarcation of the line between the legitimate, indeed the affirmatively desirable, and the illegitimate in business conduct is continually in flux and subject to wide controversy in the community".[22]

Elements of Deception

By state law, the term "deception" has been described in regard to five elements:

(1) The first element involves "...creating or reinforcing a false impression, including false impressions of fact, law, value or intention or other state of mind that the actor does not believe to be true."[23] The term "creation", as employed in this section, "...contemplates both verbal misrepresentation and conduct having that effect. Whether mere conduct, as a general matter, will suffice to support a false pretense conviction under present law is unclear, although there is authority indicating that an affirmative misrepresentation is necessary."[24]

By imposing liability for a false representation as to a state of mind, Arkansas state law "...precludes a successful prosecution grounded on evidence merely showing a default with respect to promised future action. The state must show that the actor did not intend at the time the promise was made to carry it out."[25] "Finally, it should be observed that the actor must believe his representation to be false or have no belief either way if his conduct is to fall within the provision. An honest but unreasonable belief in the truth of a false representation does not create liability."[26]

In other words, "(d)eception as to a person's intention to perform a promise shall not be inferred solely from the fact that he did not subsequently perform the promise. Deception does not include falsity as to matters having no pecuniary significance or puffing by statements unlikely to deceive ordinary persons in the group addressed."[27] Thus, the latter statement, "...in addition

to precluding any inferences of deception based solely on the failure to perform a promise, excludes from the subsection's coverage those types of misleading statements that are ordinarily tolerated in the context of commercial dealings. Exaggerating the qualities of one's goods or services is to a certain extent expected by the public and should not deceive the ordinary person. Statements as to matters without pecuniary significance are likewise beyond the statute's ambit."[28] For example, a false representation that a certain person patronized a particular hotel was held not to have defrauded a guest who stayed at the hotel as a result of the representation. Morgan v. State, 42 Ark. 131 (1883).

It should be noted that: "Criminal intent is not as easily inferred from a taking executed through a market transaction, as it is from a taking by force."[29] In affirming a mail fraud conviction, the difficulty in establishing fraudulent intent has been described in the following way:

> Fraudulent intent, as a mental element of crime,...is too often difficult to prove by direct and convincing evidence. In many cases it must be inferred from a series of seemingly isolated acts and instances which have been rather aptly designated as badges of fraud. When these are sufficiently numerous they may in their totality properly justify an inference of a fraudulent intent; and this is true even though each act or instance, standing by itself, may seem rather unimportant. Aiken v. US, 108 F2d 182 (CA4, 1939).

Furthermore, in order to demonstrate intent, it is not only necessary to establish some kind of cumulative effect in most instances, but "(u)nlike most street crimes, economic offenses require proof of the involvement and intent of 'higher-ups", if the criminal sanction is not to be confined to hirelings. This will often necessitate obtaining the testimony of those less culpable, and corroboration of their testimony.[30] This challenge was

stated well in the following words:

> The trial judge in his charge recognized that there was no general rule in law which makes a principal criminally responsible for the unauthorized acts of his agents, employees or even his salesmen, and very emphatically told the jury that it "would have to be convinced beyond a reasonable doubt that the proof shows that the defendant himself dominated and controlled his salesmen, and also knew and was participating in the scheme to defraud or sell (the securities) by means of fraudulent misstatements or statements"....US v. Hayutin, 398 F2d 944 (CA2, 1968).

(2) The second element of the term "deception" involves "...preventing another from acquiring information which would affect his judgment of a transaction."[31] This aspect of deception "...applies only if a party to a transaction actively hinders the discovery of facts that might influence the willingness of the other party to enter the transaction."[32] As is the case under the first element, "...there is no affirmative duty to disclose such facts."[33]

(3) The third element of the term "deception" entails "...failing to correct a false impression that the actor knows to be false and (a) that he created or reinforced or (b) that he knows to be influencing another to whom he stands in a fiduciary or confidential relationship."[34] This element of deception "...describes two situations in which the actor is under an affirmative duty to correct misinformation. The actor must be aware that the other party to the transactions is laboring under a false impression and must either be partially responsible for that false impression or stand in a fiduciary or confidential relationship to the other party. Imposing liability in the first situation is probably redundant since the actor who creates or reinforces a false impression has already engaged in

'deception' under (the first element). Imposing criminal liability for failure to disclose facts to one with whom the actor has a confidential or fiduciary relationship probably departs from existing law although it is clear that such conduct will suffice to establish fraud in a civil case."[35]

(4) The fourth element of deception involves "...failing to disclose a lien, adverse claim or other legal impediment to the enjoyment of property which the actor transfers or encumbers in consideration for the property or service obtained, or in order to continue to deprive another of his property, whether such impediment is or is not valid, or is or is not a matter of official record."[36]

Under this condition, "(r)einforcement contemplates an affirmative contribution to the false impression. Mere failure to correct a false impression is 'deception' only under the circumstances set out in (elements 3 and 4)."[37]

Furthermore, it remains established that: "A false representation as an inducement to pay money that something thereafter was to be or was not to be done is not a false pretense. It is well settled that in this state and elsewhere that the false pretense relied upon to constitute an offense under the statute must relate to a past event, or to some present existing fact, and not to something to happen in the future." Conner v. State, 137 Ark. 123 at 126, 206 SW 747 at 748 (1918).

Consequently, element 4 of the term "deception" "...imposes on the seller of property an affirmative duty to disclose liens or other legal impediments to the purchaser. Under current law, the seller must expressly

represent that the property is free of other claims before he is guilty of obtaining property by false pretense; the mere failure to disclose liens or legal impediments are subject at most to misdemeanor liability under (Arkansas state law)."[38]

It might be concluded, therefore, that the seller is under no affirmative obligation to reveal future encumbrances upon the land, even if they are known certainty, such as required sewage installation or road pavement. Moreover, the Supreme Court has held that the current false pretense statute is not violated if the encumbrances are in fact invalid since the seller's representations were true. State v. Asher, 50 Ark. 427, 8 SW 177 (1887); Fox v. State, 102 Ark. 451, 145 SW 228 (1912).

(5) The fifth element of deception involves "...employing any other scheme to defraud".[38] This condition would include a wide variety of offenses, including many of those specified in the Model Penal Code of 1962. And in some states this element would also include "chain distributor schemes". While this deceptive business practice constitutes a civil offense in a great many states, it is also a criminal offense in a few states, such as Montana and Florida.[39]

The term "chain distributor scheme" has been defined to mean "...a sales device whereby a person, under a condition that he make an investment, is granted a license or right to recruit for consideration one or more additional persons who are also granted such license or right upon condition of making an investment, and may further perpetuate the chain of persons who are granted such license or right upon such condition."[40]

State Law and the Model Penal Code

Section 224.7 of the Model Penal Code of 1962 sets forth explicitly seven deceptive business practices, any violation of which constitutes a misdemeanor.[41] Under this Code: "It is an affirmative defense to prosecution...if the defendant proves by a preponderance of the evidence that his conduct was not knowingly or recklessly deceptive."[42]

(1) According to the first provision of the deceptive business practices section: "A person commits a misdemeanor if in the course of business he...uses or possesses for use a false weight or measure, or any other device for falsely determining or recording any quality or quantity."[43] Statutes in the states of Montana, Maine, South Dakota and Kentucky all employ language similar to that explicated in the Model Code.[44] Yet many states omit this provision altogether.

A false weight or measure has been defined as "...one which does not conform to the standard established by the laws of the United States of America".[45] All states employing this provision in their statutes specify "purposely", "knowingly" or "intentionally" in the language of their respective laws.

(2) The second provision of the Model Penal Code stipulates that: "A person commits a misdemeanor if in the course of business he...sells, offers or exposes for sale, or delivers less than the represented quantity of any commodity or service."[46] Statutes in the states of Montana, Maine and Kentucky have adopted this section of the Code verbatim. Nevertheless, as was the previous case, many states ignore this provision entirely.

(3) The third section of the Model Penal Code provides that: "A person commits a misdemeanor if in the course of business he...takes or attempts to take more than the represented quantity of any commodity or service when as buyer he furnishes the weight or measure."[47] Again, Montana, Maine and Kentucky have reflected in their criminal statutes the essence of the Code with respect to this section. Most other states have ignored it as was the case in the previous sections.

(4) The fourth section of the Model Penal Code becomes more complicated, and more philosophical. Here a person commits a misdemeanor if in the course of business he "...sells, offers or exposes for sale adulterated or mislabeled commodities. 'Adulterated' means varying from the standard of composition or quality prescribed by or pursuant to any statute providing criminal penalties for such variance, or set by established commercial usage. 'Mislabeled' means varying from the standard of truth or disclosure in labeling prescribed by or pursuant to any statute providing criminal penalties for such variance, or set by established commercial usage."[48]

Again, the states of Maine, Montana, Kentucky and South Dakota demonstrate the closest semblance of the Model Penal Code with regard to laws prohibiting deceptive business practices. The Maine statute defines "adulterated" and "mislabeled" in precisely the same way as the Model Penal Code.[49] Montana law defines "adulterated" as "...varying from the standard of composition or quality prescribed by statute or lawfully promulgated administrative regulation, or if none, as set by established commercial usage."[50]

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Furthermore, according to Montana law, "mislabeled" means, "...varying from the standard of truth or disclosure in labeling prescribed by statute or lawfully promulgated administrative regulation, or if none, as set by established commercial usage; or...represented as being another person's produce, though otherwise labeled accurately as to quality and quantity."[51]

Combining provisions 1-4 of the Model Penal Code along with both enforcement and penalty mechanisms, South Dakota criminal law has provided that: "Any person engaged in the production, manufacture, selling, or distribution of any metallic commodity in general use, who intentionally and for the purpose of deceiving any customer or purchaser, misbrands or misrepresents the kind, gauge, analysis, weight, quantity, or quality of the metallic commodity offered for sale, or if it be an imitation, sells or offers it for sale under the distinctive name of another article, shall be deemed guilty of a misdemeanor, and if the violator is a corporation its charter shall be forfeited upon action commenced by the attorney general upon complaint of any person aggrieved, and the penalties andremedies herein provided shall be cumulative to any others prescribed by statute."[52]

(5) Section 5 of the Model Penal Code makes a misdemeanor "...a false or misleading statement in any advertisement addressed to the public or to a substantial segment thereof for the purpose of promoting the purchase or sale of property or services."[53] Again, three state laws have responded to the American Law Institute recommendations in regard to this need. They are Maine, Montana, and Kentucky.

(6) Making a false or misleading written statement for the purpose of obtaining property or credit is another limitation placed upon acceptable business practices as a result of the Model Penal Code.[54] Such offenses have been legislated against in terms of "bait advertising" in Kentucky,[55] and "wholesale" and "below cost sale" in Florida.[56]

There is a rebuttable presumption that the person named in or obtaining the benefits of any misleading advertisement or any such sale is responsible for such misleading advertisement or unlawful sale, according to Florida law.[57] Furthermore, announcing that a sale or an offer is being made by a private party rather than a business firm, corporation or association, when such statement is not true is in violation of Arkansas criminal law.[58] Such a claim is also in violation of Oklahoma law if it is intended to affect the market price of any kind of property.[59] Finally, in terms of misnaming the actual seller, Utah law stipulates that: "It is unlawful for any person, whether acting on his own behalf or on behalf of another, who is engaged in the business of buying and selling or dealing in property, real or personal, or who is engaged in the business of performing or furnishing service of any kind to the public, to advertise, call attention to or give publicity to any sale to the public of any such property or any such service, thereby representing that such sale is being made or service furnished by a person not in fact making such sale or furnishing such service."[60]

Utah law further qualifies the unauthorized use of the name or picture of an individual for purposes of promotion. In the following words it

provides that: "Any person who uses for advertising purposes or for purposes of trade, or upon any postal card, the name, portrait or picture of any person, if such person is living, without first having obtained the written consent of such person, or, if a minor, of his parent or guardian, or, if such person is dead, without the written consent of his heirs or personal representatives, is guilty of a misdemeanor."[61]

The state of Utah has legislated one of the most thorough provisions adopting the fifth and sixth parts of the Code. It has placed a comprehensive and specific ban upon falsely representing sales to be made or service furnished:

> Every person, whether acting on his own behalf or on behalf of another, who, with intent to sell or in any way dispose of real or personal property, choses in action, merchandise, service or anything of any nature whatsoever offered by such person, directly or indirectly, to the public for sale, use or distribution, or with intent to increase the consumption thereof, or to induce any member of the public to enter into any obligation relating thereto, or to acquire title thereto, or any interest therein, publishes, disseminates, circulates, or causes to be published, disseminated or circulated, or who in any manner places, or causes to be placed, before the public in this state, by any newspaper, magazine, book, pamphlet, circular, letter, handbill, placard, poster or other publication, or by any billboard, sign, card, label or window sign, showcase or window display, or by any other advertising device, or by public outcry or proclamation, or by telephone or radio, or in any other manner whatever, an advertisement regarding such property or service so offered to the public, which advertisement shall contain any statement, representation or assertion concerning such property or service, or concerning any circumstance or matter of fact connected in any way, directly or indirectly, with the proposed sale, performance or disposition thereof, which statement, representation or assertion is false in any respect, or which is deceptive or misleading, and which is known, or by the exercise of reasonable care could be known to be false, deceptive or misleading, to the person publishing, disseminating, circulating or placing before the public such advertisement, is guilty of a misdemeanor.[62]

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Still another element of provision five and six of the Model Penal Code is the intent not to sell merchandise offered or advertised. Kentucky has adopted one of the most descriptive clauses prohibiting this offense. Entitled "bait advertising", this law provides that: "A person is guilty of bait advertising when in any manner, including advertising or other means of communication, he offers to the public or a substantial number of persons property or services as part of a scheme or plan with the intent not to sell or provide the advertised property or services: (a) At the price at which he offered them; or (b) In a quantity sufficient to meet the reasonably expected public demand, unless the quantity is specifically stated in the advertisement: or (c) At all."[63]

Similar statutes have been adopted in the states of Maine, Florida and South Dakota.[64] Florida has further specified a presumption of violation in the following terms: "The failure to sell any article or a class of articles advertised, or the refusal to sell at the price at which it was advertised to be available for purchase, shall create a rebuttable presumption of an intent to violate this section."[65]

Finally, advertising false former or comparative prices has been banned in at least one criminal statute. Florida law states this restriction in the following way: "No price shall be advertised as a former or comparative price of the thing advertised unless the alleged former price was the prevailing price for not less than thirty consecutive days within the four months next immediately preceding the date of the advertisement, or unless the date when the alleged former price did prevail

is clearly and conspicuously stated in the advertisement, and on any price listing otherwise used, which must be available to customers and police officers."[66]

(7) The seventh and final provision of the Model Penal Code states that: "A person commits a misdemeanor if in the course of business he... makes a false or misleading written statement for the purpose of promoting the sale of securities, or omits information required by law to be disclosed in written documents relating to securities."[67] States having adopted this provision include Arkansas, Florida, South Dakota and Washington.[68]

Conclusion

It has been noted in both the Model Penal Code and in state statute that intent with regard to publicity for purposes of advertising or promoting trade, whether it be a product, commodity or service, must occur in either a knowingly or recklessly deceptive manner in order for their to be a finding of fault. If nonexistent or unavailable products or services are advertised, there is a rebuttable presumption of guilt in at least one state. A deceptive or fraululent business practice may range anywhere from misleading rhetoric to scratching out the serial number of an automobile on sale.

Arnold H. Loewy, Professor of Law at the University of North Carolina, holds the view that in the case of adulterated food there is liability without fault:

> (C)ulpability, though normally present, is difficult to prove. For example, a defendant who sells adulterated food is usually careless, but to prove negligence in a particular case is difficult. There are instances...where an honest and reasonable mistake will not be available as a defense. The most obvious are strict liability crimes. Since no intent is required in the first place (e.g., for selling adulterated foods...), obviously an honest and reasonable mistake will not negate mens rea.[69]

Consequently legislatures have the power to dispense entirely with the requirement of a criminal state of mind and to punish particular acts without regard to the mental attitude of the doer. Nevertheless this power is limited to so-called "public welfare offenses", and it does not extend to common law crimes. Thus nearly all statutory "public welfare offenses", such as the sale of adulterated foodstuffs or mislabeled goods, do not require mens rea or criminal intent, and as a result mistake of fact is no defense, People v. Wilson, 106 Colo. 437, 106 Pac.2d 352 (1940), 115 ALR 1230.

Intent with regard to deception for civil action in tort is not the same, however. Here the defendant is to be held liable only if he knows that he is not speaking the truth, see Irvine v. Gibson, 117 Ky. 306, 77 SW 1106 (1904); Chaddock v. Chaddock, 130 Misc. 900, 226 NYS 152 (1927); Beaubeauf v. Reed, 4 La. App. 344 (1926).

Statutes in the states of Montana, Kentucky and Maine reproduce the Model Penal Code almost verbatim in regard to the first four provisions; whereas several other states emphasize the final three provisions as embodied in their laws. In all cases action to restrain and prevent false, misleading and deceptive advertising in violation of state law is under-

taken by the state attorney general or the prosecuting attorneys of the several counties.[70]

While penalties for such offenses range from a fine in the amount of $500 to imprisonment in the county jail for a term of ninety days to six months, it should be observed that "...strong ideological differences separate the proponents and opponents of economic regulation, judgments about the effect of penal sanctions in achieving compliance tend to turn upon judgments about the merits of the substantive regulation. Liberally oriented social scientists, otherwise critical of the case made for the deterrent and vindicatory uses of punishment of ordinary offenders, may be found supporting stern penal enforcement against economic violators."[71]

In this context, Sutherland and Cressey have pointed out that: "This change in the economic system from free competition to private collectivism has been produced largely by the efforts of businessmen. Although they have not acted en masse with a definite intention of undermining the traditional American institutions, their behavior has actually produced this result."[72] It should be concluded, nevertheless, that there is "...a real difference between prosecuting one who takes money by fraud and one who takes it at the point of a gun, notwithstanding the argument that it is conceptually difficult to distinguish between the two cases. Criminal intent is not as easily inferred from a taking executed through a market transaction, as it is from a taking by force."[73]

Deceptive business practices have been known to involve longer prison sentences and larger fines, however. For example, in Montana the penalty for involvement in promoting a chain distributor scheme, a felony crime, is,

upon conviction, imprisonment in the state prison for a period not to exceed one year, or punishment by a fine not to exceed one thousand dollars, or both such fine and imprisonment. Any person convicted of a second offense under this law shall be imprisoned in the state prison for a period not to exceed five years or punished by a fine not to exceed five thousand dollars or both such fine and imprisonment.[74]

In lieu of punishment, however, states have also been known to accept an assurance of discontinuance of unlawful business practices.[75] If such is the case after the commencement of any action by a prosecuting attorney, the attorney general may not accept an assurance of discontinuance without the consent of the prosecuting attorney.[76]

Two additional exemptions for violation of deceptive business practices' laws should be mentioned as well. They involve the media and insurance companies. In the states of Arkansas, Maine, South Dakota, Florida and Washington the fact of the publishing or printing of deceptive advertising does not constitute prima facie evidence of actual knowledge of falsity. Unless the electronic or print media are aware of such falsity, they are exempt from prosecution and/or conviction for the violation of any deceptive business practice based upon the laws of the respective states.

Where advertising in connection with the sale of insurance is regulated under the insurance laws of the state, any offense is exempt from prosecution and/or conviction as a violation of any deceptive business practice law.[77] In the states where such deceptive business practice laws exist, the traditional "let the consumer beware" philosophy may no longer hold true, and some care should be taken as to the accuracy of advertising and promotional claims.

Footnotes

[1]15 USC §§41 et seq.

[2]15 USC §45 (a) (6).

[3]52 Stat. 111, Ch. 49.

[4]15 USC §45.

[5]"What Constitutes False, Misleading, or Deceptive Advertising or Promotional Practices Subject to Action by Federal Trade Commission," 65 ALR 2d 225 at 253 (1959).

[6]Id. at 263.

[7]Id. at 268.

[8]Id. at 270.

[9]Id. at 276.

[10]Id. at 278.

[11]Explicitly acknowledging this fact is Ark. Crim. Code, Ann. Ed., Title 41, Ch. 22, §41-2201, 154, 157.

[12]Op. cit., 65 ALR 2d 225 at 283.

[13]Id. at 285.

[14]Id. at 297.

[15]Id. at 299.

[16]Id. at 301-302.

[17]Id. at 303.

[18]5-A NH Rev. Stat. Ann., Ch. 580, §§1-30, 79-85; Burns Ind. Stat. Ann., Cum. Pocket Supp, Ch. 5, §35-17-5-13 (10-3040), §35-17-5-10 (10-3037), 39-41; 4 Id. Code, Cum. Pocket Supp., Ch. 31, §18-3112, 82.

[19]Model Penal Code, §224.7, 179-180.

[20]Id.

[21]Sanford H. Kadish, "Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations," 30 U Chgo. LR 423 at 435-440 (1963), in Sanford H. Kadish and Monrad G. Paulsen, Crim. Law and Its Processes, 3(Boston:Little, Brown, 1975), 57.

[22]Id.

[23]Ark Crim. Code, op. cit. at 154.

[24]Id. at 156. See McCorkle v. State, 170 Ark. 105, 278 SW 965 (1926).

[25]Id.

[26]Id. at 157.

[27]Id. at 154.

[28]Id. at 157.

[29]Kadish, op. cit., at 60. See Holland v. US, 348 US 121 at 139-140 (1954); US v. Woodner, 317 F2d 649 at 651 (CA2, 1963).

[30]Id.

[31]Ark. Crim Code, op. cit., at 154.

[32]Id. at 156.

[33]Id.

[34]Id. at 154.

[35]Id. at 156. See Johnson v. Johnson, 237 Ark. 311, 372 SW 2d 598 (1963).

[36]Id. at 154.

[37]Id. at 156.

[38]Id. at 154.

[39]Mon. Crim. Code of 1973, Title 94, Ch. 6, Part 3, §94-6-308.1, 98-99; 22 Fl. Stat. Ann., Title XLIV, §817.416, 283-284.

[40]Mon. Crim. Code, id. at 98.

[41]Model Penal Code, op. cit.

[42]Id. at 180.

[43]Id.

[44]Mon. Crim. Code of 1973, op. cit. at 97; 8 Rev. Codes of Mon. Ann., Ch. 19, §94-1901, 115; Ma. Rev. Stat. Ann., Title 17-18, Ch. 37, §901, 157; So. Dak. Cod. Laws Rev., Title 22, Ch. 22, §22-41-10, 108; 16 Ky. Rev. Stat. Ann., Ch. 516, §517.010, 571.

[45]8 Rev. Codes of Mon. Ann., id at 115.

[46] Model Penal Code, op. cit.

[47] Id.

[48]Id.

[49]Ma. Rev. Stat. Ann., op. cit. at 158.

[50]Mon. Crim. Code of 1973, op. cit. at 98.

[51]Id.

[52]8 So. Dak. Compiled Laws Ann., op. cit., 181-182.

[53]Model Penal Code, op. cit.

[54]Ib.

[55]Ky. Rev. Stat. Ann., op. cit. at 573.

[56]22 Fl. Stat. Ann., op. cit., at 521-522.

[57]Id.

[58]Ark. Crim. Code, Ann. Ed., Ch. 23, §41-2365, 180.

[59]21 Okl. Stat. Ann., §851, §1200, 243.

[60]Utah Code Ann., Ch. 4, §76-4-2, 254.

[61]Id. at 255.

[62]Id. at 253.

[63]16 Ky. Rev. Stat. Ann., op. cit. at 573.

[64]9 Ma. Rev. Stat. Ann., op. cit. at 199; 22 Fl. Stat. Ann., op. cit. at 524; 8 So. Dak. Comp. Laws Ann., Title 22, Ch. 22 §22-41-11, 181.

[65]Id.

[66]Id. at 523.

[67]Model Penal Code, op. cit.

[68]Ark. Crim. Code Ann., op. cit. at 180; 22 Fl. Stat. Ann., op. cit.; 8 So. Dak. Comp. Laws Ann., op. cit. at 180; Rev. Code of Wash. Ann., op. cit. at 27.

[69]Arnold H. Loewy, Criminal Law (St. Paul: West, 1975), 121.

[70]See, for example, Rev. Code of Wash. Ann., op. cit. at 33.

[71]Kadish, op. cit. at 55.

[72]Sutherland and Cressey, Principles of Criminology, V(1955), 40-47, in Kadish, id.

[73]Kadish, id. at 60; see also, Holland v. US, op. cit. at 139-140; US v. Woodner, op. cit. at 651.

[74]Mon. Crim. Code of 1973, op. cit. at 98-99.

[75]See Rev. Code of Wash. Ann., op. cit. at 34.

[76]Id.

[77]See 22 Fl. Stat. Ann., op. cit. at 525.